

DISPUTES REVIEW BOARD RECOMMENDATION
Asphalt Base in Lieu of Limerock Issue #34D

6 January, 2009

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Ref: US 41 (SR45), From a Point North of Bonita Beach Road to Old US 41,
Financial Project ID: 195737-1-52-01: WPI#: 1114707, Contract No.: T-1022:
Lee County: Disputes Review Board hearing regarding entitlement to
Additional Cost for using Asphalt Base in Lieu of Limerock.

Dear Sirs:

The Florida Department of Transportation, (FDOT), and Astaldi Construction Corporation, (ACC), requested a hearing concerning the above referenced issue.

CONTRACTORS POSITION

We will state the Contractors position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

“The SA No. 28 acceleration agreement required ACC to have the roadwork completed by January 1, 2006 and the Bridge tie-ins by April 1, 2006. The Contact time was extended 110 calendar days by the Department to July 20, 2006 since the execution of the S.A. No. 28 agreement by the Department.... To mitigate the effects of the weather and the disruption caused by the discrete issues, ACC installed asphalt sub-grade and base in lieu of the contractually required lime rock for the remaining roadwork.

It is ACC's position that it is due the extra cost of using asphalt base and subgrade in lieu of lime rock to mitigate the impact of the delays caused through no fault of ACC, which have been recognized by the DRB, and

inclement weather. ACC requests this DRB to recognize that ACC is due recovery for the additional cost incurred.

On March 1, 2005, ACC and the Department met in order to discuss the acceleration of the remaining Contract work to completion. On March 4, 2005, KCCS offered to support ACC in its efforts by considering alternative materials and construction techniques to further reduce and refine the scheduled required completion date.

On July 21, 2006, in regards to Progress Meeting No. 72, ACC confirmed KCCS approval to use asphalt base in lieu of rock base for the roadway work as a result of delays caused by the Department which pushed the roadway work into the rainy season. ACC requested KCCS to consider the cost difference between the two materials which was projected to be approximately \$130,000. On July 27, 2006, KCCS responded and confirmed that the approval to substitute the base material was given provided it would be at no additional cost change to the Department.

On September 26, 2006, the Department issued Supplemental Agreement No. 52 in the amount of \$87,338.73 and no time. S.A. No. 52 added lump sum pay item 4999-3 which compensated ACC for the placement of asphalt base at the approaches of the Spring Creek base in order to accelerate the works at the area. On November 16, 2007, the Department entered into an executed Supplemental Agreement S.A. No. 57 in the amount of \$180,373.76 which added a pay item for the experimental base of 9,184 M2 which replaced 40mm shoulder base of lime rock to asphalt.

The Project records represent that KCCS and the Department committed to supporting ACC in its efforts to seek alternative means and methods so as to reduce the time to perform the remaining Contract work in order to achieve or better the targeted completion milestone dates set forth in the S.A. No. 28 acceleration agreement.

The records reflect that KCCS realized the time savings to use asphalt base in lieu of lime rock as the execution of the roadway work had been pushed into the rainy season. In fact, the Department compensated ACC for a portion of its costs of using asphalt base in lieu of lime rock with the addition of S.A. No. 52 on September 26, 2006 and S.A. No. 57 on April 27, 2007. There is no doubt that use of asphalt for sub-grade and base roadway material in lieu of lime rock to mitigate the inclement weather encountered and delays caused by the Department resulted in an additional expense to ACC.

ACC requests this DRB Board to recognize that ACC is due additional entitlement for this issue.”

REBUTTAL

“On July 21, 2006, ACC again notified the Department that the impact of the delays incurred on the Project had delayed the roadwork into the rainy season. To mitigate a portion of the impact ACC proposed to use asphalt base in lieu of the contractually required lime rock. On July 22, 2006, in response to KCCS electronic message of July 18, 2006, ACC informed the Department that it would be reserving its rights to claim for the extra thickness apparently demanded by the designer of record for the approval to use the substituted material.

On July 27, 2006, KCCS replied to ACC’s response and confirmed that the modification was approved provided that ACC utilize 100mm of SP 12.5, as opposed to the 51mm requested, and that the modification would be at no cost change to the Department. On August 7, 2006, ACC again re-stated its position regarding the change of base material, and reiterated that KCCS had agreed to the solution as a means to expedite the work.

The salient points of this issue are clear. The road works were deferred into the rainy season as a result of delays caused by the Department. In an attempt to reduce the impact to the completion of the work, ACC proposed using 51mm of asphalt base in lieu of the contractually required limerock. This proposal was discussed during the July 12, 2006 Meeting. The Designer of Record approved the material change but request 100mm of asphalt base (**in regards to the stabilized sub grade**) instead of the 51mm proposed by ACC. It was understood by the parties that the change in the base material would represent an added cost to ACC. ACC proceeded with using asphalt base to expedite the road work and reduce the delay as it was beneficial to do so, as ACC was being charged with liquidated damages by the Department. The Department has benefited from the change in material, as ACC was able to proceed with the work during the rainy season and open the road to the public by November 2006. Had ACC not proceeded with the material change, the roadwork would have been completed later adding more frustration to the general public.

ACC requests this DRB to recognize that ACC is due additional entitlement for this issue.”

DEPARTMENT’S POSITION

We will state the Department’s position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Department's position paper has the following statements and references to document their claim for no entitlement to ACC for the costs of using asphalt base in lieu of limerock.

"ACC is claiming for \$130,000.00 and 180 days of compensable time as additional payment associated with using asphalt base in lieu of limerock.

ACC requested to use asphalt base in lieu of limerock by ACC letter no. 346 dated July 12, 2006. A sketch of the proposed base substitution was provided. KCCS generated KCCS RFI #71 requesting the designer to allow this change, and specified that it would be done at no additional expense to the Department. The proposed change was to use 127mm of Superpave in lieu of 300mm of limerock base (LBR 40), and to use 51mm of Superpave in lieu of 300mm of stabilized subgrade. This concept of the change was allowed, but the Department required 100mm of Type SP-12.5 in place of the Type B stabilized subgrade, rather than the 51mm proposed by the Contractor. Upon verbal notification to the Contractor of the approved change, and reiterating that the change would be at no additional expense to the Department, ACC submitted letter no. 350, requesting \$130,000, else consider the letter to be a formal notice of claim. ACC letter no. 350 was not certified. KCCS responded by letter no. 584 dated July 27, 2006 stating that no additional expense would be considered above and beyond the original contract unit prices, and that it was our understanding that the request to substitute asphalt in lieu of limerock was made in order to achieve a substantial time savings. ACC responded with their letter no. 352 dated July 22, 2008, stating that the Department's increase to the thickness in the typical section (100mm instead of 51mm for the stabilized subgrade) was done randomly with no supporting backup. KCCS responded by letter no. 585 dated July 27, 2006, restating that ACC made the request for substitution, and that the Designer of Record had responded to the ACC's request, concluding that 100mm of SP 12.5 was necessary rather than the 51mm proposed by ACC. It was again reiterated that the cost of the change would be done at no additional expense to the Department, and ACC was advised that if they did not wish to use the modification approved by the Department, then they had the option to continue with the typical section as shown in the plans.

On November 15, 2007, ACC submitted their certified request for Equitable Adjustment (REA). Page 202 of ACC's **certified** REA states that it is ACC's position that they are owed exactly \$130,000.00 and 180 days for this issue. This request was denied for the following reasons: (1) There is no basis for the claim as it was made clear to ACC that substituting asphalt base in lieu of limerock would be at no additional expense to the Department; (2) Exhibit 34.2 of the certified REA (a copy of ACC letter 350) stated that "Preliminary calculations show a cost difference approximately \$130,000.00." This one-page letter served as the only backup documentation to their request. There were no calculations provided to substantiate the amount; and (3) using asphalt base in

lieu of limerock resulted in a time savings. Therefore, a request for time a time extension on this issue is fallacious.

There is no entitlement for the claimed amount of \$130,000.00 and 180 days of time extension, as ACC was advised twice by separate letters that using asphalt base in lieu of limerock would be done at no additional expense to the Department.

In addition, although ACC included the language of Specification 5-12.3 Content of Written Claim in their REA dated November 15, 2007, ACC failed to meet the conditions of *any* of the items (a) through (e) contained in Specification 5-12.3 therein.

Finally, there is absolutely no correlation between using asphalt base in lieu of limerock which would affect time, other than to *decrease* it, as the purpose of using asphalt base in lieu of limerock was to *reduce* time. Therefore, a time extension for this issue should not be considered.

The Department respectfully asks the Board to find no entitlement as it pertains to this issue.”

REBUTTAL

“Astaldi originally submitted to the Department, a notice of intent to claim, by letter dated July 21, 2006, for the amount of “approximately” \$130,000.00 and stated in that letter, that “if monetary consideration is not given please consider this a notice of claim per specification 5-12.2.2 and preliminary request for time extension pursuant to specification 8-7.3.2.” At that time, the request was denied based upon the fact that the Department had already approved the substitution of asphalt base in lieu of limerock “at no additional expense to the Department.” ...At that time, it was understood by all parties that using asphalt in lieu of limerock would not be at the cost of the Department, and Astaldi still had the option to use limerock base.

Astaldi’s position paper makes references to instances where the Department approved and paid for the use of asphalt base in lieu of limerock in other areas. At the time those agreements were made, however, it was advantageous for the Department to utilize this alternate construction method in the hopes of meeting the milestone completion daters established by SA 28. At the time the request to use asphalt base in lieu of limerock in all remaining areas at the time the request was made (July 21, 2006), the milestone dates had already passed, and there was no more desired on the Department’s behalf to extend additional costs to the Contractor who had failed to meet the goal of the acceleration agreement.... The fact is that the Department did allow for the substitution, but made it clear that they would not consider additional costs.”

FINDINGS OF FACT

The Board's decisions are governed by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the above referenced documents, the hearing, and the following facts.

1. In an e-mail from KCCS to ACC dated July 18, 2006 approval was given for a modification to the typical section as requested. It also stated no adjustment will be made to the original contract unit prices for stabilization and optional base.
2. In an ACC letter to KCCS dated July 21, 2006 (#350) ACC stated that they are going to use Asphalt in lieu of limerock base. This letter also gave Notice of Intent to claim for the cost difference between rock base and Asphalt.
3. ACC makes note in their letter #350 that preliminary calculations show a cost difference of approximately \$130,000.
4. In a letter from KCCS to ACC dated July 27, 2006 (#584) KCCS stated that the use of Asphalt in lieu of rock base was approved. However the letter stated that there would be no consideration for additional payments above and beyond the original contract unit prices.
5. In a letter from KCCS to ACC dated July 27, 2006 (#585) KCCS again reiterated that no adjustment would be made to the contract unit prices. The letter also stated that should ACC not use the approved modification under these terms it would be prudent to continue construction per the plans.
6. Specification 4-3 gives the authority to the Engineer to make changes or alterations in the details of the work. The Engineer made the decision that the modification using Asphalt in lieu of limerock was not financially beneficial to the Department. The Department made ACC aware of this in letters and e-mails.
7. ACC stated that they were using the Asphalt in lieu of limerock to shorten the project, which would have served to reduce the overall project cost experienced by ACC.
8. ACC has not produced any breakdown of the additional claimed cost for the Asphalt.

RECOMMENDATION

The Board finds that there is no entitlement to the Contractor for the use of Asphalt base in lieu of limerock.

The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Disputes Review Board

Don Henderson, Chairman, Jack Norton, Member, Frank Consoli, Member

Signed for and with concurrence of all members

A handwritten signature in blue ink, appearing to read "Don Henderson", with a large circular flourish at the beginning.

Don Henderson, PE